TENTH CIRCUIT JUDICIAL CONFERENCE

WRITING WITH (QUIET) POWER: WHAT MAKES THE DIFFERENCE?

STEVE ARMSTRONG

WILMER CUTLER PICKERING HALE AND DORR LLP

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MAKING READERS SMART

Of all the qualities that distinguish strong legal writing from weak, one matters most. Good professional writing doesn't try to impress us by flexing its rhetorical muscles or dazzling us with its linguistic flair. Instead, it gains power quietly, by turning its readers' own strengths – their intelligence, their drive to understand what they read – to its advantage.

Powerful writing makes its readers feel smart on every page. They grasp the point quickly, follow the analysis easily, never have to stop to figure out why a detail matters. Weak writing, on the other hand, makes its readers feel unintelligent – slow to catch on, confused about how things hang together, just a little obtuse.

If your goal is to make your readers feel smart as they read, your starting point is the clarity of your own thinking. When a writer hasn't fully thought through his or her point or hasn't made the logic watertight, no amount of fancy linguistic footwork will repair the damage. But here's the bad news: To make your readers feel smart, it's not enough to think logically and then transfer that logic on the page. You also have to make your logic easy for your readers to see and understand – so easy that it leaps off the page and sticks to the mind of even a hurried, impatient reader.

To write effectively about complex matters, therefore, lawyers must master two kinds of clarity. They must impose a rigorous logic on often-recalcitrant material. Then they must make that logic obvious to their readers from the document's start through every page to the end. By training and inclination, most lawyers are expert at the first task. But they are seldom as good at the second. In fact, many never realize that the two are different, that an impeccably logical and precise analysis may still leave readers exhausted, confused, and unpersuaded. To avoid inflicting this kind of pain, you have to create not just logic on the page, but also coherence – the perception of focus and organization – in your readers' minds. A coherent document has to be logical, but it also has to be much more.

From logic to coherence

To create coherence, begin by seeing your document from your readers' perspective. To you, it is a finished product that you can grasp as a whole. For them, as they are reading it, the document as a whole never exists. At any one point, readers will remember only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

When you write a document, therefore, you are organizing a complex process: the flow of information through your readers' minds. In fact, they are trying to cope with two flows at once: the page-by-page progression of large-scale themes, ideas, and over-arching syllogisms, and the sentence-by-sentence stream of details. In the face of this onslaught, they do not remain passive. They read actively, although much of the action happens in split seconds and never reaches full consciousness. At each moment, they are deciding how much of what they just read they need to remember, figuring out how the next sentence connects with the previous ones, and forecasting where the analysis is heading.

To help readers through this process, writers have to create a clarity based not just on logic, but also on how a reader's mind deals with complicated information. To produce this "cognitive" clarity, it helps to understand a basic fact about how people read. Because they have trouble grasping dissociated details, they focus on and remember details better if they fit together with others to form a coherent pattern. Only the pattern – the story, the logic, the theme – enables readers to decide how a detail matters and whether they should bother to remember it. The harder they must work to see the pattern or fit new information into it, the less efficiently they read, and the greater the chance they will misinterpret or forget the details. In a detective story, readers are not supposed to appreciate the significance of the broken watch strap on the corpse's wrist until much later, when they realize how smart the detective has been – and how dumb they were. With good legal writing, in contrast, they should never have trouble understanding the significance of and the relationship among details as they flow past.

Creating "cognitive" clarity

To create clarity in the reader's head, not just logic on the page, a writer has to "front-load" the information that readers need if they are to understand what they are about to read – that is, if they are to feel smart. In particular, readers crave three kinds of information, and they crave it throughout a document, not just at the start:

- A **focus** that guides them to pay attention to what really matters, and helps them distinguish between critical and background information. In legal writing, the most powerful focus is usually a statement of the "end-of-the-road" issues: the final, precisely defined questions that have to be faced and answered.

- A **"map"** of how the information will be organized, so they don't have to struggle to grasp its overall structure at the same time as they're struggling with the details.

- A **transition** between new pieces of information, so they don't have to think twice about how sentences, paragraphs, and sections fit together.

CREATING A FOCUS

Example #1

Before:

MOTION TO SUPPRESS AND
EXCLUDE EVIDENCE
UNLAWFUL SEARCH AND SEIZURE

At approximately 4:00 p.m. on December 7, 1981, West Carolina State Troopers Charles Jones, Ronald Brown and David Green, accompanied by Assistant State's Attorney Frank Smith, went to John Torrance's home located at 1819 Fawn Way, Centerville, West Carolina. A search of the premises was conducted resulting in the seizure of a brown calendar book and a red notebook from Torrance's bedroom. Torrance attempts to suppress these items.

Torrance had developed as a prime suspect in a homicide which occurred during the afternoon of December 7, 1981. That fact led the troopers to his residence. At trial, Troopers Jones and Brown and Torrance's father testified about what happened in the Torrance residence.

Jones stated that Brown was in charge, and that upon arriving at the front door, they were greeted by Torrance's mother. Brown asked permission to search the house for Torrance. She allowed them to enter the house, but asked that they wait for the arrival of her husband. Brown's version of the initial contact is similar. There is no question that the purpose of the troopers was to determine if Torrance was in the house. Brown also told her that Torrance was a suspect in the homicide case and that the police wanted to search the home for Torrance. The troopers and Mrs. Torrance waited in the kitchen for the arrival of Mr. Torrance, a wait of some fifteen to twenty minutes. During the wait two events took place. First, Brown testified that while they waited they observed and listened for the signs of any movement in the house. Second, as a result of a conversation between Brown and Mrs. Torrance about a gun missing from the ….

After (insert before the original first paragraph):

John Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. He argues that the troopers did not receive the parents' informed consent for the warrantless search. Although the troopers conducted the search only after Torrance's father had signed a form permitting them to search his home and seize any material relevant to their investigation, they did not clearly explain the form to the father, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

At approximately 4:00 p.m. on . . . . . .

Example #2

Before:

This is an appeal from a dismissal of a suit to enforce a compromise settlement and judgment rendered pursuant to the settlement.

Appellant filed a claim with the Industrial Accident Board (IAB) for a work-related injury that he had sustained on October 10, 1970. Dissatisfied with the outcome of that proceeding, and in a timely manner, he filed suit in the district court of Hightop County, West Carolina, to set aside the award of the IAB. On March 17, 1972, the parties entered into a compromise settlement whereby an agreed judgment was rendered in favor of the appellant, setting aside the IAB award and granting him $6,000. Further, as a part of the agreed judgment, the appellee agreed to provide necessary future medical treatment and other related services incurred within two years of the date of judgment.

During that two-year period, appellant made a request for further medical treatment, which was refused by the appellee. Appellant then filed suit in district court on the agreed judgment alleging that appellee's refusal to provide the requested service was wrongful and in fraud of his rights. Appellee answered the suit .....

After (substitute for first paragraph):

First version:

This is an appeal from the dismissal of a suit to enforce a compromise settlement of a claim before the Industrial Accident Board, and a judgment rendered pursuant to the settlement. The suit was dismissed because the District Court found that jurisdiction remained with the Board. For the reasons given below, we reverse.

Second version:

Appellant, an injured worker, sued in district court to enforce a settlement of a claim before the Industrial Accident Board (IAB), and a judgment based on that settlement. The court dismissed the case because jurisdiction remained with the IAB. We reverse, finding the court had jurisdiction because the case before it was not an extension of the original claim, but instead arose from the wrongful refusal to fulfill a contract.

Example #3

Version 1:

We consider in this case the trial court's decision to suppress defendant's voluntary confession on the ground that defendant did not "knowingly and intelligently" waive his *Miranda* rights. We conclude that the trial court applied an erroneous legal standard in assessing the validity of defendant's *Miranda* waiver. Moreover, we conclude that the waiver was valid. Therefore, we reverse the trial court's decision suppressing defendant's confession.

Version 2:

Defendant waived his *Miranda* rights and confessed to murder. According to a psychiatric expert, he was delusional and believed that God would set him free if he confessed. The trial court concluded that his waiver was not "knowing and intelligent." But the court erred in focusing on why he confessed. The proper test for waiver is whether a defendant understands the *Miranda* rights, not whether he understands the consequences of waiving them.

Example taken from J. Kimble, "First Things First: The Lost Art of Summarizing," 8 Scribes J. Legal Writing 103 (2001-2)

Example #4

Before:

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

Defendant John Robinson respectfully submits that, under the provisions of the Speedy Trial Act, the information against him should be dismissed with prejudice because the government failed to indict him within the Speedy Trial Act's 30-day time limit.

I

The Speedy Trial Act provides, in pertinent part, that

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161 (b) (emphasis added). If this time limit not be met, the mandatory sanction is clear:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

18 U.S.C. § 3162(a)(1). Where the thirty-day filing provision is violated, dismissal is mandatory, and the only determination to be made is whether the dismissal must be with prejudice:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice.

Id.

After:

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

After charging John Robinson with the theft of merchandise worth $26, the government failed to indict him within the Speedy Trial Act's 30-day time limit.

The Act requires dismissal with prejudice when the offense is minor, the delay is caused solely by the government, and reprosecution would not contribute the administration of justice. This case meets all three tests:

- The offense charged is a misdemeanor.
- The government's failure to indict promptly resulted not from plea bargaining or any action by the defense, but solely from the government's procrastination and negligence.
- In a district where, as here, the government regularly violates the Act's time limits, reprosecution would undermine the administration of justice by encouraging the routine failure to abide by the Act's provisions.

Example #5

By this motion, Smith seeks dismissal of the only claim in Jones' complaint that survived the jury's verdict. The complaint recited six causes of action. One, breach of contract, was dismissed by Jones prior to trial. Another, tortious interference with business relations, was dismissed by this Court at the close of Jones' case. Of the four claims that went to the jury, the jury found in Smith's favor on three: fraud and breach of express and implied warranties of title. The only claim on which the jury found in Jones' favor was breach of the implied warranty of merchantability.

In this memorandum, we shall demonstrate that judgment should be entered for Smith on this claim as well. Four reasons compel this conclusion.

First, although the jury found that the warranty of merchantability had been breached, Jones introduced no evidence on the subject of whether "The Orchard" would be deemed marketable under the standards of the international art market. The jury received no guidance as to the standards of merchantability for Old Master paintings, and its verdict was thus based on sheer speculation.

Second, the alleged breach of warranty occurred with respect to goods that were never sold to Jones. Jones was therefore left to argue that Smith had anticipatorily repudiated its contract within the meaning of Section 2-609 of the Uniform Commercial Code. But before there can be a finding of anticipatory repudiation, a party must make a written demand for adequate assurance of due performance. Jones made no such written demand.

Third, there is a fundamental inconsistency between the jury's findings that the warranties of title were not breached and that the warranty of merchantability nevertheless was. Jones alleged no defects in "The Orchard" other than a defect in title. He claimed that the painting was unmerchantable because title was defective, and for no other reason. The jury found no defect in title and thus removed the only basis for finding a breach of warranty of merchantability. Jones has, in effect, proceeded on the theory that a breach of warranty of merchantability is a "lesser included offense" of a breach of warranty of title. No case decided under the Uniform Commercial Codes supports that theory.

Fourth, even if there was a breach of the warranty of merchantability, that breach was not a proximate cause of any injury to Jones. It is undisputed that Gekkoso, Jones' client, knew that Romania had tried to seize the painting in Spain in 1982. Knowing this, it was nevertheless willing to enter into a contract with Jones to purchase the painting. If Jones' view of the evidence is accepted, Gekkoso ultimately cancelled because it believed that Jones had lied about this incident. Under this view, it was Jones' deception, and not any breach of warranty, that caused him injury.

Example #6

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger -- Keep Out -- Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84. Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, willfully and knowingly steal and convert" property of the United States of the value of $84, in violation of 18 U. S. C. Sec. 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $200. The Court of Appeals affirmed, one judge dissenting.

Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240 (1952)

CLARIFYING THE STRUCTURE

Example #1
Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a non-forfeitable interest in a non-qualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less often than unfunded ones for two reasons. First, they have tax disadvantages: If an employee is given a non-forfeitable interest in a non-qualified trust, he will be taxed immediately on the amounts set aside for him. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a non-forfeitable interest in a non-qualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

Example #2

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual "possession" of the vessel or facility. This requirement is open to interpretation, as the term "possession" is not defined. Under one reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations. Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. *Actual possession*. First, the lender must take actual "possession" of the vessel or facility. Because the amendment does not define the term "possession," this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations.

Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. *Actual control*. The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

Example #3

Before:

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

The instant appeal by Plaintiff-Appellant Big Bank, N.V. ("Big Bank") relates to an Order issued by Hon. James Rogers, dated January 30, 1991 (the "Order"), pursuant to which Justice Rogers granted, in part, the motion by Defendant-Respondent Minicorp ("Minicorp") which sought to invalidate Big's assertion of the attorney-client privilege with respect to certain documents and as to testimony concerning communications between Big and its attorneys.

As demonstrated below, however, the applicable legal principles do not support the decision of the lower Court, and instead fully support Big's assertion of the attorney-client privilege. The burden on a party seeking to invalidate the attorney-client privilege is extremely high, and Minicorp has simply not made the requisite showing for the abrogation of Big's attorney-client privilege. Specifically, Minicorp, not Big, has placed the issue of Big's reliance on counsel's advice in issue in this case. As such, and in accordance with the cases discussed in Point B (e.g., Chase Manhattan Bank, N.A. v. Drysdale Securities Corp., 587 F. Supp. 57 (S.D.N.Y. 1984)), there has been no waiver of the attorney-client privilege by Big, and Minicorp's attempted wholesale invalidation of Big's attorney-client privilege should be rejected.

Moreover, Big's indication that it relied on counsel's advice demonstrates only that Big's counsel (in addition to Big itself) did have communications with Minicorp employees. As the court below noted (R. 16), Big has previously agreed that Minicorp is perfectly free to inquire as to these non-protected communications, and Minicorp has already had the opportunity to question Big's attorneys as to their contacts with Minicorp's employees. Minicorp should not, however, be permitted to invalidate Big's attorney-client privilege in its zeal to determine what its employees may or may not have told Big's representatives.

At any rate, Minicorp has itself repeatedly taken the position that only its own actions could create Mr. Smith's apparent authority. As such, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case. Therefore, nothing justifies Minicorp's attempted abrogation of Big's attorney-client privilege.

Accordingly, the decision of the Court below, to the extent that it compelled Big to produce documents as to which it had claimed the attorney-client privilege and had further required Big's representatives to provide testimony concerning communications between Big and its attorneys, should be reversed.

After:

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff-Appellant Big Bank, N.V. ("Big") appeals from an Order issued by Hon. Richard Rogers that granted, in part, a motion by Defendant-Respondent Minicorp Securities Corporation ("Minicorp") to remove the attorney-client privilege from certain documents and from testimony concerning communications between Big and its attorneys.

In the underlying action, Big seeks to recover approximately $6,000,000 in loans to Minicorp. As an inducement to Big to make the loans, an employee of Minicorp executed a letter representing that Minicorp would maintain certain collateral. Minicorp does not dispute that the representation was fraudulent. It does claim, however, that the employee did not have apparent authority to make the representation. In its motion, it asked for a wholesale abrogation of the attorney-client privilege between Big and its attorneys on the basis that Big's attorneys had communicated with Minicorp's employees during the course of arranging the loan and that Big had subsequently relied on counsel's advice in making the loan.

The burden on a party seeking to invalidate the attorney-client privilege is extremely high. For three reasons, Minicorp has failed to meet this burden.

First, Minicorp has itself repeatedly taken the position that only its own actions could create the employee's apparent authority. As a result, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case.

Second, Minicorp itself -- not Big -- placed the question of Big's reliance on counsel's advice in issue in this case. Big cannot, therefore, be held to have waived the privilege.

Third, Big has agreed that Minicorp is free to inquire about communications between Big's attorneys and Minicorp's employees, and Minicorp has already questioned the attorneys about these contacts. Minicorp does not need to attack the attorney-client privilege between Big and its attorneys in order to investigate the attorneys' communications with Minicorp.

Accordingly, the decision of the Court below should be reversed to the extent that it compelled Big to produce documents as to which it claims attorney-client privilege and required Big's representatives to provide testimony about communications between Big and its attorneys.

CREATING FLOW: SMOOTHING THE TRANSITIONS

Example #1

Before:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. The concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum -- is at the center of this struggle. The attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers, is one reason for the recent popularity of this concept. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. Although the market shares of the several component firms within their individual markets remain unchanged in conglomerate mergers, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

After:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. At the center of this struggle is the concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum. One reason for its recent popularity is the attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. In these conglomerate

mergers, although the market shares of the several component firms within their individual markets remain unchanged, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

Example #2:

Before:

Like any other contract or agreement, a lease is construed in accordance with the intention of the parties, which is gathered from its language in light of the circumstances surrounding the parties at the time they executed it. Courts generally engage in "purpose interpretation" when examining the intention of the parties and place great weight on the parties' understanding of the purpose of a particular provision.

After:

Like any other contract or agreement, a lease is construed in accordance with the parties' intention, which is gathered from its language in light of the circumstances surrounding the parties at the time they executed it. When courts examine the parties' intention, they generally engage in "purpose interpretation," placing great weight on the parties' understanding of the purpose of a particular provision.

Example #3:

Before:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. The Supreme Court applies a balancing test to determine whether a citizen's rights have been violated in unreasonable search cases. The test balances the citizen's privacy interests against the government's interests that are furthered by the search.

After:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. To determine whether a citizen's rights have been violated in a search, the

Supreme Court applies a balancing test. This test balances the citizen's privacy interests against the government's interests that are furthered by the search.

or

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. To determine whether a citizen's rights have been violated in a search, the Supreme Court applies a test that balances the citizen's privacy interests against the government's interests that are furthered by the search.

Example #4

Before:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county or municipality, may not be sued without its consent. Osborn v. Bank of the United States, 22 U.S. 738 (1824). The purpose of the immunity of public officials is not directly to protect the sovereign, but to protect the public official while he performs his governmental function, and it is thus a more limited immunity than governmental immunity. Courts have generally extended less than absolute immunity for that reason. The distinction between discretionary acts and ministerial acts is the most commonly recognized limitation. The official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment." See Prosser, Law of Torts 132 (4th ed. 1971).

After:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county or municipality, may not be sued without its consent. Osborn v. Bank of the United States, 22 U.S. 738 (1824). The immunity of public officials, in contrast, does not protect the sovereign directly, but only the public official while he performs his governmental function. For this reason, courts have generally extended less than absolute immunity. The most commonly recognized limitation arises from the distinction between discretionary and ministerial acts. Under this distinction, the official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment." See Prosser, Law of Torts 132 (4th ed. 1971).

GRACE NOTES: HOW RHYTHM MAKES READERS SMART

Example #1

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters. ....

Winston Churchill

* * * * * *

Example #2:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues. ....

Justice Cardozo

Example #3

Before:

The conflict, moreover, involves an important question of law on which a uniform nationwide rule is essential. For example, it would be intolerable for the minimum wage provisions to have different applications in different regions of the country. In the same way, it would also be intolerable for there to exist in some states but not others a judge-made exception to the priority of a secured creditor's perfected lien under the UCC. The continuing inconsistency on these matters could have serious economic consequences because creditors would be reluctant to finance businesses in regions where their liens may not enjoy true priority.

After:

Moreover, the conflict involves an important question of law on which a uniform nationwide rule is essential. It would be intolerable, for example, for the minimum wage provisions to be applied differently in different regions of the country. Similarly, it would be intolerable for courts in some states, but not in others, to grant exceptions to the priority of a secured creditor's perfected lien under the UCC. This inconsistency would do more than inconvenience specific creditors. In a region where creditors are reluctant to finance businesses because their liens may not enjoy true priority, [the region's economy could suffer serious economic consequences].

* * * * * *

Example #4:

By this motion, Smith seeks dismissal of the only claim in Jones' complaint that survived the jury's verdict. The complaint recited six causes of action. One, breach of contract, was dismissed by Jones prior to trial. Another, tortious interference with business relations, was dismissed by this Court at the close of Jones' case. Of the four claims that went to the jury, the jury found in Smith's favor on three: fraud and breach of express and implied warranties of title. The only claim on which the jury found in Jones' favor was breach of the implied warranty of merchantability.

In this memorandum, we shall demonstrate that judgment should be entered for Smith on this claim as well. Four reasons compel this conclusion.

First, although the jury found that the warranty of merchantability had been breached, Jones introduced no evidence on the subject of whether "The Orchard" would be deemed marketable under the standards of the international art market. The jury received no guidance as to the standards of merchantability for Old Master paintings, and its verdict was thus based on sheer speculation.

Second, the alleged breach of warranty occurred with respect to goods that were never sold to Jones. Jones was therefore left to argue that Smith had anticipatorily repudiated its contract within the meaning of Section 2-609 of the Uniform Commercial Code. But before there can be a finding of anticipatory repudiation, a party must make a written demand for adequate assurance of due performance. Jones made no such written demand.

Third, there is a fundamental inconsistency between the jury's findings that the warranties of title were not breached and that the warranty of merchantability nevertheless was. Jones alleged no defects in "The Orchard" other than a defect in title. He claimed that the painting was unmerchantable because title was defective, and for no other reason. The jury found no defect in title and thus removed the only basis for finding a breach of warranty of merchantability. Jones has, in effect, proceeded on the theory that a breach of warranty of merchantability is a "lesser included offense" of a breach of warranty of title. No case decided under the Uniform Commercial Codes supports that theory.

Fourth, even if there was a breach of the warranty of merchantability, that breach was not a proximate cause of any injury to Jones. It is undisputed that Gekkoso, Jones' client, knew that Romania had tried to seize the painting in Spain in 1982. Knowing this, it was nevertheless willing to enter into a contract with Jones to purchase the painting. If Jones' view of the evidence is accepted, Gekkoso ultimately cancelled because it believed that Jones had lied about this incident. Under this view, Jones' injury was caused not any breach of warranty, but by his own deception.